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IN THE SUPREME COURT OF THE UNITED STATES

No. 747

NELSON L. WHYTE,

Appellant,

v.

COAST CITIES COACHES, INC.,
GEORGE L. MORRIS, and
STANLEY L. GREEN, and
FRED L. HICKLING,

Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

A. This cause was first heard in the Circuit Court for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida. The Trial Court entered a Final Decree, which is appended hereto as Exhibit #1 (A 1-9), wherein it determined the rights of the parties in and to a written contract in accordance with **standard accounting practices** as provided in the agreement. The Appellant here (Plaintiff in the Trial Court, Appellee in the District Court of Appeal, Third District for the State of Florida and the Appellant in the Supreme Court of the State of Florida) prevailed, but upon Appeal to the District Court of Appeal, Third District for the State of

Florida, the Trial Court was reversed and the Appellate Court entered its Opinion and Judgment of Reversal, which is appended hereto as Exhibit #2 (A 10-17); a Petition for Rehearing was denied by Order of the District Court of Appeal. Thereafter, the Appellant, Whyte, filed an Appeal to the Supreme Court, State of Florida, which, upon Motion of the Appellees, was quashed. A copy of said Order Quashing Appeal is appended hereto as Exhibit #3 (A 18).

B. The jurisdiction of this Court is invoked on constitutional grounds:

(i) The proceeding commenced under the authority of Chapter 87 of the Florida Statutes Annotated, more particularly under Section 87.02 of the Florida Statutes Annotated, which provides for the bringing of certain causes for declaratory decree.

(ii) The Judgment sought to be reviewed is the Judgment of Reversal of the District Court of Appeal, Third District of the State of Florida, dated May 8, 1958 (A 10-17), which said Judgment was made final by the Order of the Supreme Court of the State of Florida quashing the Appellant's (Whyte's) Appeal on October 21, 1958 (A 18); prior to the quashing of the Appeal on October 21, 1958, a Motion of the Appellant (Appellee at that time) to rehear in the District Court of Appeal, was denied on June 12, 1958. Thereafter, on December 8, 1958, the Appellant, Nelson L. Whyte, filed, in the Supreme Court of the State of Florida, his Notice of Ap-

peal to the Supreme Court of the United States, a copy appended hereto as Exhibit #4 (A 19-20), which said Notice of Appeal was amended on December 18, 1958, and a copy of said Amended Notice of Appeal is appended hereto as Exhibit #5 (A 21-23).

(iii) The Supreme Court of the United States has jurisdiction of this Appeal under and by virtue of Title 28 U.S.C.A. 1257 (2).

(iv) The cases which sustain the jurisdiction of this Court are as follows:

(1) McCullough v. Commonwealth of Va., 172 U.S. 102, 43 L.Ed. 387, 19 S. Ct. 134.

(2) Houston & T.C. R.Co. v. Texas, 177 U.S. 66, 44 L.Ed. 673, 20 S.Ct. 545.

(3) Columbia R. Gas & E. Co. v. South Carolina, 261 U.S. 236, 67 L.Ed. 629, 43 S.Ct. 306.

(4) Atlantic Coast Line R. Co. v. Phillips, 332 U.S. 168, 91 L.Ed. 1977, 67 S.Ct. 1584.

(v) While a statute of the State of Florida is involved in connection with the Judgment sought to be reviewed, it is not contended by the Appellant that the statute itself is invalid or unconstitutional or that it has been construed, but simply that the application of the same to the case at bar is erroneous and without reason, and

that it impairs contractual obligations guaranteed by the Constitution of the United States (6th clause of Section 10, Article I) **in violation of the 14th Amendment to the Constitution of the United States of America.** The Statute is Section 608.52, Florida Statutes Annotated, which reads as follows:

"DIVIDENDS

Dividends may be paid to stockholders from the net earnings or from the surplus of the assets over the liabilities including capital of a corporation, but not otherwise. When the directors shall so determine, dividends may be paid in stock. Added Laws 1953, c.28170, § 1."

C. The sole question presented by the Appeal is simply set out as follows:

DID THE FLORIDA COURT, IN THE APPLICATION OF SECTION 608.52 OF THE FLORIDA STATUTES ANNOTATED TO THE ISSUE INVOLVED IN THIS CAUSE, IMPAIR THE OBLIGATIONS OF THE CONTRACT IN VIOLATION OF THE 6TH CLAUSE OF SECTION 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES AND/OR DEPRIVE THE APPELLANT, NELSON L. WHYTE, OF DUE PROCESS OF LAW IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

D. This case may be stated concisely and briefly as follows:

Nelson L. Whyte, as Plaintiff, filed an Amended Complaint under Chapter 87, Fla. Stat., F.S.A., in the Circuit Court of Dade County, Florida, appended as Exhibit #6 (A 24-43), seeking a declaratory decree and other relief with respect to a certain contract attached as Exhibit "A" to his Complaint. All Defendants filed Answers, and after a trial before the Chancellor, a Final Decree (A 1-9) awarded the Plaintiff, Nelson L. Whyte and Defendant Fred L. Hickling, who was aligned in interest as a Plaintiff, certain relief; from that Decree, Defendants Coast Cities Coaches, Inc., George L. Morris and Stanley L. Green took an Appeal to the District Court of Appeal for the Third District of Florida which, upon consideration, entered an Opinion and Judgment reversing the Decree appealed from, and from that Opinion and Judgment, as made final by the Order of the Supreme Court of Florida quashing Appellant's Appeal to said Court, this Appeal was taken.

Plaintiff's Amended Complaint sought a declaratory decree to settle once and for all a disagreement between the parties as to the meaning of the term "net earnings of the company", as that term was employed in paragraph (3) of said contract, and to determine the proper method for computing "net earnings of the company", as stipulated in said paragraph (3) of said contract; in other words, the proper method of computing "the net earnings of the company**** **in accordance with standard accounting practices.**" . . . . . (underscoring ours). According to the terms of the contract Plaintiff, WHYTE and FRED L. HICKLING had sold to Defendants, MORRIS and

GREEN, all of their capital stock in COAST CITIES COACHES, INC., and WHYTE and HICKLING, as sellers, had entered into the contract with MORRIS and GREEN, and COAST CITIES COACHES, INC., for the purpose of effecting that sale of stock, and to stipulate the manner in which WHYTE and HICKLING were to be paid the amount agreed (See Para. (3) due them for their stock. The disagreement arose because GREEN and MORRIS, who were the purchasers of the entire capital stock of COAST CITIES COACHES, INC., insisted that they had a right to deduct from the gross earnings of said corporation, interest which accrued upon various corporate obligations, in arriving at the "net earnings of the company", whereas WHYTE contended and insisted that "Standard Accounting Practices" did not permit the deduction of interest accrued on corporate obligations from gross receipts in order to arrive at the "net earning of the company." The stipulation of the contract in controversy, read as follows:

> "(3) It is understood that payment to the stockholders of the indebtedness set forth in paragraphs 1 and 2 above will be paid by applying on said indebtedness one-half (½) of the net earnings of the Company computed annually at the end of each calendar year. **The net earnings shall be determined in accordance with standard accounting practices and shall be arrived at after the payment of all federal income and other taxes due.** The application of the said one-half (§) of the net earnings to the indebtedness referred to shall be made in proportion to the respective amounts thereof; that is, one-half (½) of the net earnings annually shall be applied to

each of the said indebtednesses in the percentage that such indebtedness bears to the sum total of all of the indebtedness amounting to two hundred seventy four thousand four hundred twenty two and 96/100 ($274,422.96) dollars.

Plaintiff, WHYTE, sought by declaratory decree to obtain a judicial declaration and determination of this question which would determine and settle that question, not only with reference to the "net earnings of the company" for the years 1952, 1953, 1954, and 1955, which had passed, but also to settle that question in such a manner that, once determined and settled, it would govern the parties for all succeeding years during the life of the contract; the prayer for a money decree, paragraph (b) of the prayer, was merely incidental, and depended entirely and wholly upon the results of the prayer for declaratory decree.

At this time, for fuller explanation of the cause and Plaintiff's contention, the following is an excerpt from Plaintiff's Brief filed in the Supreme Court of State of Florida:

***POINT INVOLVED ON APPEAL AND ARGUMENT**

IN COMPUTING THE "NET EARNINGS OF THE COMPANY, ****** IN ACCORDANCE WITH STANDARD ACCOUNTING PRACTICES AND **** ARRIVED AT AFTER THE PAYMENT OF ALL FEDERAL INCOME AND

---

*Beginning of Quoted Excerpt

OTHER TAXES DUE", INTEREST ON CORPORATE OBLIGATIONS CANNOT BE DEDUCTED FROM THE GROSS RECEIPTS.

This Point is the only substantial point in this case, and is the point upon which Plaintiff's Amended Complaint was predicated.

We respectfully contend and submit that the Decree of the Circuit Court correctly determined that in computing the "net earnings of the company ***** in accordance with standard accounting practices" that interest is not deductible from gross receipts, and we respectfully submit and contend that the Opinion and Judgment of the Court of Appeal completely ignored the terms of the contract and deprived the Plaintiff of his property without due process of law in violation of Article 12 of the Declaration of Rights of the Constitution of Florida, **and in violation of the 14th Amendment of the Constitution of the United States, and also plainly impaired the obligations of Plaintiff's contract in violation of the 6th clause of Section 10, Article I to the Constitution of the United States.**

The parties to the contract expressly stipulated as to the manner in which the "net earnings of the company" should be computed, and that the contract contained the expressed stipulation:

> "The net earnings shall be determined in accordance with standard accounting practices and shall be arrived at after the payment of all federal income and other taxes due."

We respectfully submit that the parties by the terms of the contract thus stipulated the precise method for computing the "net earnings of the company" and that "Standard accounting practices" was a term which the Chancellor below was required to define in the light of the testimony in evidence of the parties and that in determining what "standard accounting practices" were in that respect, the learned Chancellor was required to determine a question of fact, and we submit that the Opinion and Judgment of the Court of Appeal in legal effect **re-wrote the contract between the parties and deprived the Plaintiff of his rights as a party to the contract.** The Court of Appeal ignored the fact that the contract between the parties used the term "net earnings of the company", computed ***** "in accordance with "standard accounting practices," whereas by its Opinion and Judgment it founded its decision on an entirely foreign premise . . . i.e., **net income**, completely unrelated to the issue. The Court on Page 852 of the Opinion and Judgment in 102 So.2d. 847 stated:

> (8) "If we were dealing with the abstract proposition of what constituted **net income** under standard accounting practices, we might be able to aggree to the conclusions reached by the chancellor in the trial court that interest on corporate debt may not be deducted. That, however, is not the real question with which we are confronted . . ." (underscoring ours)

We respectfully suggest and submit that the District Court of Appeal erred upon the record in the above entitled cause and that this case involved a **"net earnings"** not **"net income"**, and the only question before the Court

was "What constituted net earnings according to standard accounting practices", or to employ the exact language of the contract which the Court was called upon to construe:

> "In determining **net earnings in accordance with standard accounting practices** should interest of corporate obligations be deducted from gross earnings in order to arrive at net earnings?"

We respectfully submit that the District Court of Appeal overlooked the fact that the parties themselves, by their contract, had expressly stipulated that "the net earnings of the company" should be computed and determined in a certain specified manner, that is in accordance with "standard accounting practices", and that in departing from that specified method we respectfully submit that the Court has undertaken to rewrite the contract and made a different contract for the parties . . . **that such action with or without resort** to an existing statute, F.S.A. 608.52, **wholly unrelated**, resulting violates **constitutionally guaranteed** proper rights. For example in **Redlon Co.** v. **Franklin Square Corp.** (N.H.1937) 195 Atl. 348, one item of the specifications in connection with the building contract involved in that case read as follows:

> "WATERPROOFING. — All exterior foundation walls are to be within 6" of the grade and are to be waterproofed on the outside after the forms are removed by applying two coats of an approved manufacture of **Membrane Waterproofing** which is to be applied strictly in accordance with the directions of the manufacturer. After this is approved, backfilling may be done."

"The Standard Documents of the American Institute of Architects", which had been incorporated into the contract (Text: 349-350) provided that:

> "Materials or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

The Court held that the contract contained its own cannon of construction, that is, that the "materials or work" must conform to the "well known technical or trade meaning" and no other standard could be applied:

> "The evidence showed conclusively that the term 'membrane waterproofing' had a well known trade meaning and denoted fabric or felt, alternating with asphalt or pitch. While asserting that he did not know this definition when the contract was made, the architect in effect conceded that he was enlightened as to the correct meaning by the defendant's evidence. What the plaintiff did apply with the architect's knowledge and approval was a coat of asphalt laid on from a spray gun. This process is known in the trade as damp-proofing.
>
> The referee found that 'damp-proofing' was what the architect meant by the term 'membrane waterproofing' when he specified the latter, and that the work done was identical with what the contract called for. He denied the defendant any allowance for breach of the contract. This was equivalent to a ruling that the con-

tract meant what the architect understood it to mean when he wrote it. ***** The plaintiff argues that the architect's interpretation was binding.

**** Arbitrary interpretation is not permitted, nor can the architect adopt as the canon of construction what he understood by 'membrane waterproofing' when he drew the contract. The meaning of the words, not that of the scrivener, is to be ascertained.

The contract provides its own standard — the well known trade meaning. Neither party could be heard to say that he had in mind something else. Even less could the scrivener be allowed to say that he had a definition peculiar to himself."

In the case at bar the contract provides its own standard: "In accordance with standard accounting practices", and we submit that when "standard accounting practices" were ascertained and determined then the terms of the contract required "that net earnings of the company" be determined in the manner found to be "in accordance with standard accounting practices". We respectfully submit and suggest that the District Court of Appeal has departed from the rule of construction long settled in this state that:

"The intention is to be deduced from the language employed, and such intention, when expressed, is controlling regardless of the intention existing in the minds of the parties. The

> language used in a contract is the best possible evidence of the intent and meaning of the contracting parties. It is to be assumed that the intent of the parties is the same as that distinctly expressed in their written contract. A contract should receive that construction which will best effectuate the intention of the parties as expressed therein." 7 **Florida Jurisprudence— Contracts 140-141, citing Fla. cases.**

We respectfully submit that the District Court of Appeal in the Opinion and Judgment filed in this case has completely departed from the terms of the contract and has adopted a construction not "in accordance with standard accounting practices", and otherwise in derogation of constitutionally guaranteed property rights.

We respectfully submit that the contract in this case **was not and is not a contract to pay out of dividends,** but on the contrary, a contract providing for payment out of "the net earnings of the company computed annually at the end of each calendar year." And the contract expressly stipulated, not that same be paid out of dividends, but out of net earnings ***** determined in accordance with standard accounting practices . . .**

E. The federal question sought to be reviewed was raised at the first opportunity, namely upon the Appellate Court rendering its decision in which the Appellant claims his contractual rights were impaired by the application of Section 608.52 of the Florida Statutes Annotated to the issueinvolved, and that the Appellant, therefore,

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**End of Quoted Excerpt

was deprived of due process of law, as stated aforesaid. This was raised by Assignment of Error to the Supreme Court of the State of Florida which refused to review and pass upon the question. Said Assignment of Error is appended hereto as Exhibit #7 (A 43-46).

F. It is contended:

(1) That the application of the State statute abrogated the rights of the parties to contract and impaired the obligations created by and existing under said contract.

(2) That the decision of the State Court is repugnant to the Constitution of the United States of America.

(3) That the federal question was seasonably raised and is subject to no further review by the State Courts.

(4) That the question first arose upon the decision of the District Court of Appeal of the Third District for the State of Florida in its application of a statute wholly unconnected with the issue and that this violation of constitutionally guaranteed rights was not only the controlling, but sole issue in the cause upon the rendition of the Opinion and Judgment of the District Court of Appeal (A 10-17).

The Appellant relies upon the cases previously cited, and in addition thereto, states that the question is so substantial as to require plenary consideration.

WHEREFORE, the Appellant respectfully requests this Court to take jurisdiction of this Appeal.

Respectfully submitted,

JOSEPH A. PERKINS
1107 Biscayne Building
Miami 32, Florida
Attorney for Appellant

CERTIFICATION AND PROOF OF SERVICE

I, JOSEPH A. PERKINS, Attorney for the Appellant, depose and say: that a copy of the foregoing Jurisdictional Statement was delivered to the offices of: SHUTTS, BOWEN, SIMMONS, PREVATT & JULIAN, ESQS., First National Bank Building, Miami, Florida, Attorneys for COAST CITIES COACHES, INC.; to MILTON M. FERRELL, ESQ., 550 Brickell Avenue, Miami, Florida, Attorney for GEORGE L. MORRIS and STANLEY L. GREEN; and to S. GROVER MORROW, ESQ., Ingraham Building, Miami, Florida, Attorney for FRED L. HICKLING, this 3 day of March, 1959.

Joseph A. Perkins

JOSEPH A. PERKINS
Attorney for Appellant

Sworn to and subscribed before me this 3 day of February, 1959.

Josephine L. Herrington

Notary Public State of Florida at Large
My commission expires: 7/18/60

EXHIBIT 1

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY. IN CHANCERY. No.

NELSON L. WHYTE,

Plaintiff,

vs.

COAST CITIES COACHES, INC., a Florida corporation; GEORGE L. MORRIS, STANLEY L. GREEN, and FRED L. HICKLING,

Defendants.

FINAL DECREE

The above-styled cause coming on for final hearing upon Plaintiff's Amended Complaint, and Defendant's Answers thereto, and upon the testimony and evidence offered by the respective parties, upon consideration thereof, it is

CONSIDERED, ORDERED, ADJUDGED, and DECREED as follows:

1: That Plaintiff, NELSON L. WHYTE, has by competent evidence, proved the material allegations of his Amended Complaint, and that the equities of this cause are with said plaintiff, and that said plaintiff is entitled to the relief sought thereby except as hereinafter decreed; that defendant, FRED L. HICKLING, is aligned in interest with Plaintiff, NELSON L. WHYTE, and is hereby decreed to be entitled to the same relief as said Plaintiff, Nelson L. Whyte.

2: That Plaintiff, NELSON L. WHYTE, and Defendant, Fred L. Hickling, are entitled to a decree, determining and declaring their rights, and determining and declaring the liabilities of defendants, COAST CITIES COACHES, INC. and GEORGE L. MORRIS and STANLEY L. GREEN to said Nelson L. Whyte and Fred L. Hickling under and by virtue of that certain contract dated January 19, 1952, described as Exhibit "A" to said Amended Complaint.

3: That it is hereby determined, declared, and decreed as follows:

(a) That on January 19, 1952, Defendant, COAST CITIES COACHES, INC., a Florida corporation, and Plaintiff, NELSON L. WHYTE, and Defendant, FRED L. HICKLING, entered into said contract, Exhibit "A" to Plaintiff's complaint, with defendant, George L. Morris, and Plaintiff's Exhibit No. 8 is a true copy of said contract, Exhibit "A" to said Amended Complaint.

(b) That after execution and delivery of said contract, Exhibit "A", defendant, George L. Morris, designated himself and Defendant, Stanley L. Green as the ultimate purchasers under said contract, and at all times material to this suit, defendants, George L. Morris and Stanley L. Green, were the ultimate purchasers of 120 shares of the capital stock of said Coast Cities Coaches, Inc., a Florida corporation, which constituted and still constitutes the entire outstanding capital stock of said corporation, and pursuant to said designation of said defendants, acquired and became owners of all of said capital stock of Coast Cities Coaches, Inc., and took complete control of said corporation, COAST CITIES COACHES,

INC., and all of its property and assets, and also took complete control of all of the books and records of said corporation.

(c) That pursuant to said contract, Exhibit "A", and upon designation of said George L. Morris and Stanley Green as ultimate purchasers of said 120 shares of the capital stock of said Coast Cities Coaches, Inc., said George L. Morris and Stanley L. Green became the sole stockholders of said corporation.

(d) That it was provided in Paragraph (1) of said contract, Exhibit "A", that the obligations created thereby should "be evidenced by new notes of the company bearing no interest, executed as of the date of this agreement", and that the obligations created by paragraph (2) of said contract should "be evidenced by non-interest bearing promissory notes of the ultimate purchaser"; by paragraphs (1) (2) and (3) it was provided that said notes, that is, the note of Coast Cities Coaches, Inc., and notes of said ultimate purchasers, George L. Morris and Stanley L. Green, should be paid "out of the net earnings of the company as set forth below in paragraph 3" of said contract, Exhibit"A", and, equity regarding that as done which ought to be done, this cause must be considered as though such promissory notes were duly executed and delivered, and accordingly, it is hereby determined, declared and decreed that said contract, Exhibit "A", and said promissory notes constituted an equitable assignment to Nelson L. Whyte and Fred L. Hickling of "one-half (½) of the net earnings of the Company computed annually at the end of each calendar year" to be divided between them in the proportion stipulated in said paragraph 3 of said contract, Exhibit "A".

(e) That according to standard accounting practices, the "net earnings" of Coast Cities Coaches, Inc., should be ascertained, determined and computed by deducting from the gross earnings or gross receipts realized by said Corporation from the operation of said bus line, the expenses of operating said bus line to earn such gross earnings or gross receipts; that the term "net earnings of the company" computed and determined in accordance with "standard accounting practices" and "arrived at after the payment of all Federal income taxes and other taxes due", as provided by paragraph 3 of said Contract, Exhibit "A", should be ascertained, determined and computed by deducting from the gross earnings, gross receipts or operating revenues realized from the operation of said bus line, as shown on line number two (2) of Schedule No. 3001 of the Annual Report of Coast Cities Coaches, Inc., to the Florida Railroad and Public Utilities Commission, on page 27 of said Reports, the expenses of operating said bus line to earn such gross earnings, gross receipts or operating revenue, to wit, all expenses shown on Schedule No. 320 on page 28 of said Reports to The Florida Railroad and Public Utilities Commission, and as shown on line 3 of said Schedule No. 3001, plus all Federal income taxes and other taxes paid as shown on line 9 of said Schedule No. 3001, and that the remainder constitutes the "net earnings of said company" computed and determined "in accordance with standard accounting practices," and in accordance with paragraph 3 of said contract, Exhibit "A". That the term "net earnings of the company" computed and determined "in accordance with standard accounting practices" and "arrived at after the payment of all federal income and other taxes due", as provided by paragraph three of said contract, Exhibit "A" to said complaint, is synonymous with the term "operating income"

as said term is employed on line 10 of said Schedule No. 3001, and is synonymous with the term "Net Operating Income", as said term is employed in the "Statement of Income" in the Financial Statements of Coast Cities Coaches, Inc. admitted in evidence as Defendants' Exhibits Nos. 3, 4, and 5, and that in computing and determining the "net earnings of the company" as provided by said contract "in accordance with standard accounting practices", interest upon obligations, contracts, or indebtedness of said company, Coast Cities Coaches, Inc. cannot be deducted from gross earnings, gross receipts, or operating revenues before arriving at said "net earnings of the company", and that any such interest is a charge against, and is payable only out of said "net earnings of the company" computed "in accordance with standard accounting practices", and in accordance with paragraph 3 of said contract, Exhibit "A", to said complaint.

(f) That plaintiff, NELSON L. WHYTE, and defendant, FRED L. HICKLING, were entitled to receive one-half of the "net earnings of the company", computed in the manner decreed in paragraph (e) for the calendar year 1953, and each calendar year thereafter, until all sums due or to become due to them under and by virtue of paragraphs (1) (2) and (3) of said contract, Exhibit "A" to said complaint, have been paid in full, the amount due or to become due being payable on January 1, of each calendar year, commencing on January 1, 1953, and on the first day of January of each year thereafter until paid, with interest at the legal rate of 6% per annum thereon from the date any such sum shall be due and payable, until paid, such computation to be made at the end of each calendar year; each year shall stand by itself, there

being no right to carry over from one year into the next year's accounts any loss or deficit suffered.

(g) That during the calendar years 1953, 1954, and 1955, the "net earnings of the company" computed in the manner stipulated in paragraph 3 of said contract, Exhibit "A", were as follows:

Net Earnings for 1953 — $16,109.23
Net Earnings for 1954 — $15,298.20
Net Earnings for 1955 — $11,990.54

That the total "net earnings of the company" for the calendar years 1953, 1954 and 1955, computed in the manner aforesaid was $43,397.97.

(h) That one-half of said "net earnings of the company" should be paid to Nelson L. Whyte and Fred L. Hickling in the proportions stipulated in paragraph 3 of said contract, Exhibit "A" to said complaint; that is to say, 82.15% thereof to Nelson L. Whyte and 17.85% to Fred L. Hickling, and that the amount due to Nelson L. Whyte and Fred L. Hickling for the calendar years 1953, 1954 and 1955 is computed as follows:

	50% of Net Earnings	Interest at 6%		Whyte 82.15%	Hickling 17.85%
1953	$8,054.61	$1,570.65	(1/1/54 to 4/1/57)	$ 7,907.14	$1,718.12
1954	7,649.10	1,032.63	(1/1/55 to 4/1/57)	7,132.04	1,549.69
1955	5,995.27	449.64	(1/1/56 to 4/1/57)	5,294.49	1,150.42
TOTAL	$21,698.98	$3,052.92		$20,333.67	$4,418.23

That during each calendar year, commencing with the year 1953 and each calendar year thereafter one-half of the "net earnings of the company" shall be divided between said Nelson L. Whyte and said Fred L. Hickling in the proportion aforesaid.

(i) That Paragraph seven(7) of said contract, Exhibit "A" of said complaint, insofar as same provides that Nelson L. Whyte shall be employed in an official capacity as operating head of the company is contrary to public policy and unenforcible.

4: That Nelson L. Whyte, do have, receive and recover of and from defendants, Coast Cities Coaches, Inc. and George L. Morris and Stanley L. Green, the sum of $20,333.67, together with interest thereon at 6% from April 1, 1957 until paid in full; and Defendant, Fred L. Hickling do have, receive, and recover from Defendants, Coast Cities Coaches, Inc., and George L. Morris and Stanley L. Green the sum of $4,418.23, together with interest thereon at 6% per annum from April 1, 1957 until paid in full.

5: That all sums decreed to be due to said Nelson L. Whyte and Fred L. Hickling, together with interest as aforesaid, and all sums hereafter becoming due pursuant to said contract, Exhibit "A" to said complaint constitute a lien upon all of the outstanding capital stock of said Coast Cities Coaches, Inc., superior in dignity to the interest of said George L. Morris and Stanley L. Green, or either of them, or any persons, firms or corporations claiming by, through or under them, and it is hereby ordered and decreed that if the sums hereby decreed to be due to said Nelson L. Whyte and Fred L. Hickling be not

paid in full within two (2) days from and after entry of this decree, that said stock consisting of 120 shares of the capital stock of Coast Cities Coaches, Inc. shall be delivered by defendants, George L. Morris and Stanley L. Green, to the Clerk of this Court for sale to satisfy the amount decreed to be due to said Nelson L. Whyte and Fred L. Hickling, and it is further ordered and decreed that the Clerk of this Court, upon receipt of said stock, shall give not less than ten (10) days notice of the sale of said stock, which sale shall be held at the south door of the Courthouse in Dade County, Florida, between the hours of 11:00 A.M. and 2:00 P.M. on the date fixed in said Notice of sale, which shall be made for cash, to the highest bidder, except that Plaintiff, Nelson L. Whyte, and defendant, Fred L. Hicklin, or either of them, may become bidders at such sale, and if either Whyte or Hickling become purchasers at said sale, they shall be allowed to apply against the amount of his or their bid the amount hereby decreed to be due to him or them; Whyte shall be required to pay in cash only 17.85% of his bid, plus all costs, and Hickling shall be required to pay in cash only 82.15% of his bid and all cash, and if such sale be made and confirmed, defendants, George L. Morris and Stanley L. Green, and all persons claiming by, through or under them, shall be barred and foreclosed of all equity of redemption in or to said stock, and the Clerk shall deliver same to such purchaser, and thereupon it shall be the duty of the officers of Coast Cities Coaches, Inc., to transfer said stock on the books of said Corporation to such purchaser or purchasers, and to issue to such purchaser or purchasers new certificates evidencing such stock.

6: That the Court hereby reserves jurisdiction of this cause for the purpose of entering any further orders or decrees necessary, suitable and proper to carry into execution this final decree, and also retains jurisdiction to enter any further orders or decrees necessary, suitable or proper in order to grant further relief as provided by Section 87.07 Fla. Statutes 1955.

7: That Nelson L. Whyte recover his costs, and that said costs of this cause be and same are hereby taxed against defendants, Coast Cities Coaches, Inc., and George L. Morris and Stanley Green, to be assessed upon motion after notice to counsel.

8: That execution issue according to law for any sums decreed to be due to Nelson L. Whyte and Fred L. Hickling, or either of them.

DONE AND ORDERED in Chambers in the City of Miami, Dade County, Florida, this 2 day of May, 1957.

GEORGE E. HOLT
Circuit Judge.

EXHIBIT 2

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT, JANUARY TERM A.D. 1958

COAST CITIES COACHES, INC., a Florida Corporation; GEORGE L. MORRIS and STANLEY L. GREEN,
Appellants,

NELSON L. WHYTE and FRED L. HICKLING,
Appellees.

CASE NO. 57-402

Opinion filed May 8, 1958.

An Appeal from the Circuit Court for Dade County, George E. Holt, Judge.

Shutts, Bowen, Simmons, Prevatt & Julian, and Milton M. Ferrell, for appellants.

Jeptha P. Marchant and Joseph A. Perkins, and S. Grover Morrow, for appellees.

DREW, E. HARRIS, Associate Judge.

This is an appeal from a final decree rendered in the Circuit Court for Dade County. The suit was one for declaratory decree concerning a contract under which the appellees Whyte and Hickling had sold the corporate stock of their transportation company, Coast Cities Coaches, Inc. to the appellants Morris and Green.

In the contract in question, in paragraph one, it was acknowledged that the corporation was indebted to Whyte for $145,422.96 and to Hickling for $9,000.00 aggregating

$154,422.96. It was provided that such indebtednesses would be evidenced by a new note of the corporation, and would be repaid "out of the net earnings" of the corporation in accordance with paragraph three of the agreement.

In paragraph two it was agreed that the purchasers would pay $80,000.00 to Whyte for his 80 shares of the common stock of the corporation, and would pay $40,000.00 to Hickling for his 40 shares, and that these sums also would be paid only "out of the net earnings" of the corporation in the manner set forth in paragraph three.

Paragraph three of the contract provided as follows:

> "(3) It is understood that payment to the stockholders of the indebtedness set forth in paragraphs 1 and 2 above will be paid by applying on said indebtedness one-half (½) of the net earnings of the company computed annually at the end of each calendar year. The net earnings shall be determined in accordance with standard accounting practices and shall be arrived at after the payment of all federal income and other taxes due. The application of the said one-half (½) of the earnings to the indebtednesses referred to shall be made in proportion to the respective amounts thereof; that is, one-half (½) of the net earnings annually shall be applied to each of said indebtednesses in the precentage that such indebtedness bears to the sum total of all of the indebtednesses amounting to two hundred seventy-four thousand four hundred twenty-two & 96/100 ($274,422.96) dollars."

For the several years which intervened between the time of such sale and the filing of the suit, the corporation showed an annual net operating income of between ten and twenty thousand dollars. In those years there was included in the annual statement an item of interest expense (the origin and nature of which is not explained on the record) in amounts ranging from fourteen to twenty thousand dollars, and enough to offset the net operating income figure and to indicate an overall net loss for the year.

One of the sellers, the appellee Whyte, filed the suit for declaratory decree against the above named appellants, and joined the other seller Hickling as a defendant. By his amended complaint Whyte elaborated on the facts above referred to, alleged that he had received no payments and sought a ruling that the contract provision for payment of the obligations to him and Hickling out of the "net earnings" of the corporation entitled them to be paid out of the "net operating income" without deduction of the said "interest expense" and to recover amounts payable on that basis.

Defendants Morris and Green filed a motion to have the court eliminate the defendant Hickling from the case. Denial of the motion was assigned as error. That assignment was without merit, because the suit was for the construction and enforcement of a contract to which Hickling was a party, and where his rights, which were the same as those of the plaintiff Whyte, necessarily would be affected. If Hickling was not a necessary party he was a proper one.

The defendants Morris and Green filed motions to

dismiss and to transfer the cause to the law side of the court, which motions were denied. Answers were filed in which said defendants contended there were no provisions of the contract requiring construction by the court and denied that there was any dispute as to the meaning of the contract. However, the defendants insisted on the benefit of the contract as they had construed it.

Refusal to transfer the cause to the law side was not harmful, or prejudicial error. The suit was filed under Chapter 87, Fla. Stat., F.S.A., relating to declaratory decrees and judgments. It was within the purview of that act, because the parties were in real doubt and disagreement regarding the construction to be placed upon a contract affecting them. See May v. Holley, Fla. 1952, 59 So.2d 636, 639; Modernage Furniture Corp v. Miami Rug Company, Fla. 1955, 84 So.2d 916, 918. In City of Miami v. Miami Transit Company, Fla. App. 1957, 96 So.2d 799 it was pointed out that a suit for declaratory decree may be filed either in equity or at law, and that the choice should depend upon the subject matter in determining whether it is cognizable in equity or at law.

Appellants argue that the refusal of the court to transfer the cause to the law side deprived them of a jury trial. That would not be so, in a proceeding for declaratory decree under chapter 87. Actions thereunder styled on the law side do not contemplate jury trial, though provision is made for submission of issues of fact in such cases for determination by a jury. See Section 87.08, Fla. Stat., F.S.A.

This record does not disclose any rejected request to assign an appropriate factual issue in the case for decision

by a jury. Moreover, the main question was one of construction of the contract which, though it involved some evidence, was primarily a question of law to be ruled on by the court.

The trial before the court was concerned primarily with the matter of construing the contract on this issue relating to interest. The chancellor made a decree in which he held, in favor of the sellers, that the contract called for payment of the indebtednesses in question by application annually of one-half of the earnings consisting of the net operating income after taxes; thus holding that the corporation was not entitled to offset such income by charging against it the interest on corporate obligations, and the decree included money judgments accordingly, in favor of Whyte and Hickling, with provisions to secure and enforce the judgments, and costs.

We turn now to appellants' third point, based on assignments of error challenging the disregard of interest on corporate obligations in determining the corporation's net earnings, and which point is stated in appellants' brief as follows:

> "Where an agreement provides that certain debts owed by a corporation and certain other debts owed by its stockholders for purchase of their stock are all to be paid only out of the corporation's net earnings 'determined in accordance with standard accounting practices and . . . arrived at after the payment of all federal income and other taxed due', such net earnings must be determined after deducting interest on current corporate debts."

Having held that this suit was properly brought under the declaratory judgment act (Chapter 87, Fla. Stat., F.S.A.,) we are necessarily required to examine the contract in question for the purpose of determining the intention of the parties at the time the contract was entered into. Clark v. Clark, Fla. 1955, 79 So.2d 426. It should also be observed that every contract is made in view of the law in force and applicable thereto. Grand Lodge v. Williams, 122 Fla. 147, 165 So. 688.

If we were dealing with the abstract proposition of what constituted net income under standard accounting practices, we might be able to agree to the conclusions reached by the chancellor in the trial court that interest on corporate debt may not be deducted. That, however, is not the real question with which we are confronted. The plaintiffs in bringing the suit under the declaratory judgment act necessarily accepted the premise that doubts and uncertainties existed with reference to the contract which they were entitled to have resolved. We are, therefore, not dealing with an abstract or theoretical proposition; the prime subject of our inquiry is what the parties intended to accomplish by the contract itself. This requires a careful consideration of not only the words used in the contract but the obvious purpose intended to be accomplished by it.

It should be emphasized that no question of fraud, bad faith or mismanagement is involved in this case. The basic issue is the technical one involving the fund from which these indebtednesses should be paid.

We think the answer to this whole proposition is found in the simple observation that during all of the

years under question this corporation could not have legally paid any dividend to any of its stockholders.

The questioned language, "net earnings * * * in accordance with standard accounting practices" is used in connection with the provision for the repayments not only of the corporation's indebtednesses to Whyte and Hickling but also in connection with the indebtedness for the purchase of the 120 shares of stock of Whyte and Hickling. Obviously corporate funds other than those lawfully allocable to dividends could not be used to pay for the purchase of the stock from Whyte and Hickling. To put it another way, any funds of the corporation used to pay for the stock of Whyte and Hickling would have to be charged to the dividend account of the corporation and would be income to the sole stockholder of the company (the assignee of Whyte and Hickling of the 120 shares). It is conceivable, however, that the indebtedness of the company to Whyte and Hickling could be paid out of other assets of the company. Therefore, we must assume that in using the same language with reference to both accounts it was intended that only those assets of the corporation which could lawfully be used in the payments of dividends could be used in the discharge of either of the indebtednesses.

The statutes of this state provide that dividends may be paid to stockholders from net earnings or from any surplus of assets over liabilities including capital of the corporation but not otherwise. See Section 608.52, Fla. Stat., F.S.A. The law is abundantly clear that in determining the question of net earnings for the purpose of paying dividends, interest charges must be deducted. 13

AM. Jur. 661 sec. 668. See also the annotation appearing in 55 A.L.R., beginning at page 27.

We, therefore, conclude that the intention of the parties was that interest on the corporate indebtedness would have to be deducted in determining the fund out of which the questioned accounts were to be paid. Such conclusion results in a lawful contract as to both items—the opposite conclusion necessarily results in rendering the provision for the stock illegal. James C. Gulf Life Insurance Co., Fla. 1953, 66 So.2d 62, 7 Fla. Jur., Contracts, §§86-88.

This question is not one which can be determined on the theory that there was substantial evidence to support the findings and ruling of the chancellor. The question of what the parties intended by the use of the questioned words resolved itself into a mixed question of law and fact. We hold that the trial judge was in error in his conclusions of law and misconstrued the legal effect of the evidence, and that the decree should be, and it hereby is reversed, with directions to enter a decree in accordance with these views.

Reversed.

CARROLL, CHAS., C.J., and HORTON, J., concur.

EXHIBIT 3

IN THE SUPREME COURT OF FLORIDA, JULY TERM, A.D. 1958

Tuesday, October 21, 1958

NELSON L. WHYTE,

Appellant,

vs.

COAST CITIES COACHES, INC., A Florida Corporation, GEORGE L. MORRIS, STANLEY L. GREEN, and FRED L. HICKLING,

Appellees.

The attorneys for appellees have filed a motion for the entry of an order quashing the appeal in this cause from the District Court of Appeal of Florida, Third District, and the same having been duly considered, it is ordered that said motion be and the same is hereby granted and said appeal quashed.

EXHIBIT 4

IN THE SUPREME COURT OF FLORIDA, JULY TERM, A.D. 1958

NELSON L. WHYTE,

Appellant,

vs.

COAST CITIES COACHES, INC., a Florida corporation, GEORGE L. MORRIS, STANLEY L. GREEN, and FRED L. HICKLING,

Appellees.

NOTICE OF APPEAL

The Appellant, NELSON L. WHYTE, takes and enters his appeal to the Supreme Court of the United States of America to review the order of the Supreme Court of the State of Florida, dated October 21, 1958, quashing the appeal in this cause from the District Court of Appeal of Florida, for the Third District, and/or to review the judgment of said District Court of Appeal of Florida for the Third District bearing date the 8th day of May 1958 entered in the above-styled cause and recorded in Minute Book 1, at page 360, on the 8th day of May, 1958, and also from the Order and Judgment of said District Court of Appeal of Florida for the Third District, dated June 12, 1958, entered in the above-styled cause, recorded in Minute Book 1 at page 423, on the 12th day of June, 1958, denying Appellees' Petition for Rehearing, and all parties to said cause are called upon to take notice of entry of this

appeal, which is filed pursuant to RULE 2.1 (5)(b) of the Florida Appellate Rules.

MARCHANT & PERKINS

By JOSEPH A. PERKINS
Of Counsel
Attorneys for Nelson L. Whyte
1107 Biscayne Building
Miami 32, Florida

I HEREBY CERTIFY that the original Plaintiff, NELSON L. WHYTE, has paid all costs that have accrued in and or about the suit, and have been specifically taxed against him, up to and including the time of the taking of this appeal.

JOSEPH A. PERKINS
Of Counsel for Appellant.

I CERTIFY that a copy of the above and foregoing Entry of Appeal has been served upon SHUTTS, BOWEN, SIMMONS, PREVATT & BOUREAU, Attorneys for Coast Cities Coaches, Inc., First National Bank Building, Miami, Florida; MILTON M. FERRELL, ESQ., Attorney for George L. Morris and Stanley L. Green, 2nd Floor of the Five Fifty Building, Miami, Florida, by mail, delivery this 5 day of December, 1958.

JOSEPH A. PERKINS
Of Counsel for Appellant,
Nelson L. Whyte.

EXHIBIT 5

IN THE SUPREME COURT OF FLORIDA

NELSON L. WHYTE,

Appellant,

vs.

COAST CITIES COACHES, INC., a Florida corporation, GEORGE L. MORRIS, STANLEY L. GREEN, and FRED L. HICKLING,

Appellees.

AMENDED NOTICE OF APPEAL

I.

(A) The Appellant, NELSON L. WHYTE, takes and enters his appeal to the Supreme Court of the United States of America to review the order of the Supreme Court of the State of Florida, dated October 21, 1958, quashing the appeal in this cause from the District Court of Appeal of Florida, for the Third District, and/or to review the judgment of said District Court of Appeal of Florida for the Third District bearing date the 8th day of May 1958, entered in the above-styled cause and recorded in Minute Book 1, at page 360, on the 8th day of May, 1958, and also from the Order and Judgment of said District Court of Appeal of Florida for the Third District, dated June 12, 1958, entered in the above-styled cause, recorded in Minute Book 1 at page 423, on the 12th day of June, 1958, denying Appellees' Petition for Rehearing, and all parties to said cause are called upon to take notice of entry of this appeal, which is filed pursuant to RULE 2.1 (5)(b) of the Florida Appellate Rules.

(B) This appeal is taken pursuant to 28 U.S.C. 1257 (2).

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include the following:

A certified copy of the record on appeal in the Supreme Court of the State of Florida.

III.

The following question is presented by this appeal:

DID THE FLORIDA COURT, IN CONSTRUING SEC. 608.52 OF FLORIDA STATUTES ANNOTATED AS APPLICABLE TO THE ISSUE INVOLVED IN THIS CAUSE, DEPRIVE THE APPELLANT, NELSON L. WHYTE, OF DUE PROCESS OF LAW IN VIOLATION OF SEC. 12 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

MARCHANT & PERKINS

By JOSEPH A. PERKINS
Attorneys for Appellant,
Nelson L. Whyte
1107 Biscayne Building
Miami 32, Florida.

PROOF OF SERVICE

I, JOSEPH A. PERKINS, of Counsel for Nelson L. Whyte, Appellant herein, depose and say, that on the 18th day of December, 1958, I served a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States on COAST CITIES COACHES, INC., GEORGE L. MORRIS, STANLEY L. GREEN and FRED L. HICKLING, Appellees herein, by delivering the same to the receptionists in the offices of SHUTTS, BOWEN, SIMMONS, PREVATT & BOUREAU, Attorneys for Coast Cities Coaches, Inc., First National Bank Building, Miami, Florida and to MILTON M. FERRELL, ESQ., Attorney for George L. Morris and Stanley L. Green, 2nd Floor Five Fifty Building, Miami, Florida.

JOSEPH A. PERKINS

Sworn to and subscribed before me, at Miami, Florida, this 18 day of December, 1958.

JOSEPHINE L. HERRINGTON
NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

My commission expires 7-12-60

EXHIBIT 6

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY No. 179210-A

NELSON L. WHYTE,

Plaintiff,

vs.

COAST CITIES COACHES, Inc., a Florida corporation, GEO. L. MORRIS, STANLEY L. GREEN, and FRED L. HICKLING,

Defendants.

AMENDED COMPLAINT

NELSON L. WHYTE, Plaintiff, for his Amended Complaint, against Defendants, COAST CITIES COACHES, INC., a Florida Corporation, GEO. L. MORRIS, STANLEY L. GREEN, and FRED L. HICKLING, says:

(1) That Plaintiff, NELSON L. WHYTE, and Defendant, FRED L. HICKLING, are each residents of Florida, over 21 years of age; Defendants, GEO. L. MORRIS and STANLEY L. GREEN, are each residents of Alabama, over 21 years of age, and COAST CITIES COACHES, INC., is a Florida Corporation, with its principal place of business in Dade County, Florida.

(2) On January 19, 1952, Plaintiff, NELSON L. WHYTE, and Defendant, FRED L. HICKLING, were the owners of all of the capital stock of COAST CITIES COACHES, INC., a Florida Corporation, the defendant

in this suit, and Defendants, GEO. L. MORRIS and STANLEY L. GREEN desired to purchase all of said capital stock in said Corporation, and for that purpose, Plaintiff, Whyte, and Defendant, Hickling, as stockholders, entered into an agreement with said COAST CITIES COACHES, INC., and GEO. L. MORRIS, as Trustee for a corporation to be formed, therein referred to as the purchaser, or a nominee to be designated by said Geo. L. Morris, therein referred to as the ultimate purchaser, a true copy of which contract is attached to Plaintiff's original complaint filed in this cause, as Exhibit "A" thereof, and hereby made a part of this Amended Complaint as fully as though set forth herein, and hereinafter referred to as Exhibit "A".

(2A) That after the execution of said contract, Exhibit "A" said GEO. L. MORRIS designated himself, said GEO. L. MORRIS, and Defendant, STANLEY L. GREEN, as the ultimate purchasers under said contract and at all times material to this suit, said defendants were the ultimate purchasers mentioned in said contract, Exhibit "A".

(3) That it was stipulated and agreed by paragraph one (1) of said contract, Exhibit "A" that at the time of the execution thereof, said corporation, COAST CITIES COACHES, INC., was indebted to Plaintiff, NELSON L. WHYTE in the sum of $145,422.96, and was also indebted to said Defendant, FRED L. HICKLING, in the sum of $9,000.00, which said sums, it was stipulated and agreed would be paid to Plaintiff, NELSON L. WHYTE, and Defendant, FRED L. HICKLING, out of the net earnings of said company, to-wit, COAST CITIES COACHES, INC., a Florida Corporation, in accordance

with the provisions of paragraph three (3) of said contract and it was also agreed that said purchasers, to wit, Defendants, GEO. L. MORRIS, and STANLEY L. GREEN, they being the ultimate purchasers, would pay to said Plaintiff, NELSON L. WHYTE, for his eighty (80) shares of the stock of said Corporation, the sum of Eighty thousand ($80,000.00) and would pay to said FRED L. HICKLING for his forty (40) shares of the stock of said corporation the sum of $40,000.00, and that both of said sums would be paid only out of the net earnings of the company, to wit, COAST CITIES COACHES, INC., a Florida Corporation, in the manner prescribed and set forth in paragraph three (3) of said contract, all of which will appear from said Exhibit "A".

(4) That it was stipulated in and by paragraph three (3) of said contract, Exhibit "A" that said sums due Plaintiff, WHYTE, and Defendant, HICKLING, would be paid out of the net earnings of the company, to wit, COAST CITIES COACHES, INC., computed in the following manner: by applying on said indebtedness one-half (½) of the net earnings of the company, computed annually at the end of each calendar year; and provided that said net earnings should be determined in accordance with standard accounting practices and should be arrived at after the payment of all federal and other taxes due, and that application of said one-half (½) of the net earnings to said indebtednesses should be made in proportion of the respective amounts thereof; that is, one-half (½) of the net earnings annually should be applied to each of said indebtednesses, to wit, said indebtedness due to Plaintiff, Whyte, and said indebtedness due defendant, Hickling, in percentage that such indebtedness bears to the total sum of all said in-

debtednesses, amounting to $274,422.96, all of which will appear from said contract, Exhibit "A".

(5) That after the execution and delivery of said contract, Exhibit "A" said defendants, GEO. L. MORRIS, and STANLEY L. GREEN, as the ultimate purchasers under said contract, took complete control of said corporation, and all of its property, and assets, and also took control of all of its books and records which would reflect or disclose the amount of the net earnings of said corporation, and said Geo. L. Morris and Stanley L. Green, as such ultimate purchasers, have failed and refused to pay Plaintiff, NELSON L. WHYTE or Defendant, FRED L. HICKLING anything whatever out of the net earnings of said company, COAST CITIES COACHES, INC., during the calendar years 1952, 1953, 1954 or 1955, although, Plaintiff alleges the fact to be that certain sums have been realized as net earnings during said years, the exact amount of which is to plaintiff unknown, but he alleges that if the net earnings of said company, to wit, COAST CITIES COACHES, INC., should be or are computed or determined in accordance with standard accounting practices, that after the payment of all federal income and other taxes, the operation of said corporation resulted in net earnings for the calendar years of 1953 and 1954 in the sum of $21,761.15.

(6) That after Plaintiff had examined the operating statements of said corporation, and had ascertained and determined in accordance with standard accounting practices, that after the payment of all federal income and other taxes, said corporation had realized net earnings for said two calendar years, be computed the amount due and payable to himself in accordance with said con-

tract, Exhibit "A" and made a formal written demand for payment thereof by letter, a copy of which is attached to Plaintiff's original complaint as Exhibit "B" thereof, and hereby made a part hereof. That Plaintiff alleges that if the net earnings of said corporation are computed in the manner prescribed by said contract, that is to say, in accordance with standard accounting prac' 's, that the net earnings of said corporation for said o calendar years would amount to $21,761.15, of w' ı said sum Plaintiff, Whyte, was entitled to be paid ' proper proportion, which would be 82.145% which would amount to the sum of $8,937.84, but there exists a disagreement and controversy between Plaintiff, NELSON L. WHYTE, and said defendants as to the manner in which said computation should be made, and a disagreement and controversy as to what is in accordance with standard accounting practice, or what standard accounting practices are with reference to computing net earnings of said company, to wit, Coast Cities Coaches, Inc., a Florida Corpation, in this, that after Plaintiff had made his written demand, Exhibit "B" said Coast Cities Coaches, Inc., failed and refused to pay Plaintiff said sum or any part thereof upon the ground or because, according to the computation of accountants for said corporation, said corporation had no net earnings during each or either of said two years, but instead, lost money or sustained an operating loss during each of said two calendar years, as will appear from the letter, in reply to Plaintiff's demand, Exhibit "B" attached hereto as Exhibit "C" and hereby made a part hereof.

(7) Plaintiff alleges that according to standard accounting practices, net earnings are, properly, the gross receipts, less the expense of operating the bus

line, that is to say, operating the business of said corporation, as a means of earning such gross receipts, and that according to standard accounting practices interest on debts is payable out of net earnings, but, Plaintiff alleges that said Defendants are erroneously insisting upon deducting from the gross earnings of said corporation the amount of various alleged interest charges, whether such sums have in fact been paid as interest at all or not, and that by that device, said defendants have computed the net earnings in such a manner as to show a loss, rather than a profit, but Plaintiff, alleges that net earnings computed in such a manner are not computed in accordance with standard accounting practices, and that a dispute, disagreement, or controversy exists between Plaintiff and Defendants as to the meaning of the term "in accordance with standard accounting practices," and that a dispute, disagreement or controversy exists between Plaintiff and said defendants as to the proper interpretation of paragraph three (3) of said contract, Exhibit "A" insofar as same relates to the method to be used on computing net earnings.

(8) Plaintiff alleges the fact to be that if the net earnings of said corporation, COAST CITIES COACHES, INC., a Florida corporation for the calendar year 1955 are or should be calculated or computed in accordance with standard accounting practices, that after payment of all federal income and other taxes due and payable by said corporation, the operation of said corporation's business for said calendar year will result in net earnings subject to division, in which Plaintiff, and Defendant, Hickling, will be entitled to share and participate under the terms of paragraph three (3) of said contract, Exhibit "A".

(9) Plaintiff, NELSON L. WHYTE alleges that because of the dispute, disagreement and controversy between him and Defendants concerning the manner in which net earnings of said corporation shall be computed, that is to say, because of the dispute, disagreement and controversy between them as to the correct method of computation to be employed in order to determine net earnings in accordance with standard accounting practices, and particularly, because of Plaintiff's claim and contention that standard accounting practices do not permit the deduction of interest on debts from gross earnings in order to arrive at and determine net earnings, and his contention that standard accounting practices require that interest on debts be paid out of net earnings, rather than out of gross earnings, that he is in doubt as to his rights under said contract, Exhibit "A".

(10) That Plaintiff is now, and always has been ready, able and willing to serve said corporation, COAST CITIES COACHES, INC., in an official capacity, as operating head of said company or corporation as stipulated in paragraph seven (7) of said contract, Exhibit "A" and by the terms of said contract, Exhibit "A" he is entitled to be so employed until the sums due Plaintiff and Defendant Hickling are paid, and while same remain unpaid, yet, said defendant Corporation has refused to employ him in such capacity since January 5, 1953, and although Plaintiff demanded that he be so employed by his letter, Exhibit "B" said defendant has failed and refused to employ him in such capacity, and Plaintiff alleges that he is in fact able and qualified to serve in said capacity, and that his services in that capacity are, and at all times have been reasonably and fairly worth at least $500.00 per month, but said defendant refuses to employ

him, or pay him a reasonable salary for services in that capacity.

WHEREFORE, Plaintiff prays:

(a) That the Court construe, and declare the effect of said contract, Exhibit "A" and particularly, paragraph three (3) thereof, and that the Court declare what method of computation is in accordance with standard accounting practices, and that the Court find, determine and declare what standard accounting practices are or may be in computing the net earnings of COAST CITIES COACHES, INC., a Florida Corporation, under and pursuant to paragraph three (3) of said Exhibit "A" and particularly, that the Court determine, declare and decree that net earnings are, properly, the gross receipts, less the expense of operating the business of said corporation to earn such gross receipts, and that interest on debts is payable out of net earnings, and cannot be charged against or deducted from gross receipts in computing or arriving at net earnings of said corporation for the purpose of dividing net earnings between said corporation, and Plaintiff, Nelson L. Whyte, and Defendant, Fred L. Hickling, and that the Court ascertain, determine, and declare the rights of plaintiff, Nelson L. Whyte under said contract, and particularly, with respect to the method of computing net earnings as stipulated in paragraph three (3) thereof.

(b) That the Court take an accounting, or cause an accounting to be taken in accordance with standard accounting practices, as the court may find and decree such standard accounting practices to be, to determine the amount of net earnings, if any, of said corporation,

for the calendar years, 1952, 1953, 1954 and 1955, and if it shall upon such accounting be ascertained that the operation of said business did result in any net earnings during each or any of said years, that the Court ascertain the amount or part thereof due to Plaintiff, Nelson L. Whyte and Fred L. Hickling, and that the Court enter a decree in favor of Plaintiff for such sum as the Court may find to be due to said Plaintiff, and require payment thereof within a short day to be fixed by the Court in its decree, and issue execution therefor, or otherwise enforce payment thereof.

(c) That the Court determine and declare whether Plaintiff, Nelson L. Whyte is entitled to be employed as operating head of COAST CITIES COACHES, INC., in an official capacity, as stipulated in paragraph seven (7) thereof, and that the Court construe, determine and declare the rights of Plaintiff with respect thereto, and enter a decree determining his rights, and awarding Plaintiff such sum, if any, as he has been entitled to receive as salary since January 5, 1953, down to the date of the Court's decree.

(d) That the Court grant Plaintiff such relief as equity may require, and the circumstances may justly demand.

L. J. CUSHMAN
Attorney for Plaintiff

L. J. CUSHMAN,
Attorney for Plaintiff.

AGREEMENT

THIS AGREEMENT is executed this 19th day of January 1952, between COAST CITIES COACHES, INC., a Florida corporation, hereafter referred to as the Company and NELSON A. WHYTE and FRED L. HICKLING, hereafter referred to as the stockholders and GEO. L. MORRIS, as Trustee for a corporation to be formed hereafter referred to as the purchaser, the said corporation to be formed, or other nominee to be designated by said GEO. L. MORRIS hereafter referred to as the ultimate purchaser.

WHEREAS, the stockholders represent and warrant that they own or control all of the outstanding capital stock of the Company consisting of a total of one hundred twenty (120) shares of non-par value common stock, NELSON A. WHYTE owning or controlling eighty (80) shares thereof and FRED L. HICKLING owning or controlling forty (40) shares thereof, and

WHEREAS, the Company is the owner and holder of certificates of public conveyance and necessity numbered 277 and 325 issued by the Florida Railroad and Public Utilities Commission and authorizing the transportation of persons by motor vehicle as a common carrier in the North Dade County area and between the North Dade County area and the center of the City of Miami and between Hollywood, Florida, and the center of the City of Miami Beach, Florida, all as set forth in said certificates and the orders of the said Commission defining the same, and

WHEREAS, the stockholders desire to sell and the

purchaser desires to purchase all of the capital stock of the company pursuant to the terms of this Agreement.

NOW THEREFORE, it is mutually agreed between the parties as follows:

(1) It is understood that the Company is indebted to NELSON A. WHYTE in the amount of one hundred forty-five thousand four hundred twenty two & 96/100 ($145,422.96) dollars which indebtedness is to be repaid out of the net earnings of the company and in accordance with provisions of paragraph 3 below. It is also understood and agreed that the Company is indebted to FRED L. HICKLING in the amount of nine thousand & no/100 ($9,000.00) dollars which is to be repaid in a like manner out of the net earnings of the company as set forth below in paragraph 3. These two (2) obligations shall be evidenced by new promissory notes of the company bearing no interest, executed as of the date of this Agreement and providing for payment in accordance with the terms hereof. All existing notes or other evidence of said obligations shall be surrendered to the Company and cancelled.

(2) It is understood and agreed that the purchaser will pay to NELSON A. WHYTE for the eighty (80) shares of stock in the Company owned or controlled by him the sum of eighty thousand & no/100 ($80,000.00) dollars and will pay to FRED L. HICKLING for his forty (40) shares of stock in the Company the sum of forty thousand & no/100 ($40,000.00) dollars and that both of said sums will be paid only out of the net earnings of the Company in the manner as set forth in paragraph 3 below. It is understood and agreed that the obligations

described in this paragraph will be evidenced by non-interest bearing promissory notes of the ultimate purchaser but that the same will be payable only out of the earnings of the Company as set forth in paragraph 3 below and in no event shall the purchaser be liable beyond the said net earnings of the Company as set forth in paragraph 3 below.

(3) It is understood that payment to the stockholders of the indebtedness set forth in paragraphs 1 and 2 above will be paid by applying on said indebtedness one-half (½) of the net earnings of the Company computed annually at the end of each calendar year. The net earnings shall be determined in accordance with standard accounting practices and shall be arrived at after the payment of all federal income and other taxes due. The application of the said one-half (½) of the net earnings to be indebtednesses referred to shall be made in proportion to the respective amounts thereof; that is, one-half (½) of the net earnings annually shall be applied to each of said indebtednesses in the percentage that such indebtedness bears to the sum total of all of the indebtednesses amounting to two hundred seventy four thousand four hundred twenty two & 96/100 ($274,422.96) dollars.

(4) In consideration of the obligations undertaken by the ultimate purchaser pursuant to this Agreement, all of the outstanding stock and certificates evidencing their ownership or control of all of the capital stock of the Company, and a new stock certificate shall be issued by the company to the ultimate purchaser for the one hundred twenty (120) shares of stock agreed to be purchased hereunder. The said new stock certificate to be issued to the purchaser shall thereupon be pledged as collateral se-

curity for the repayment of all the indebtedness set forth in paragraphs 1 and 2 above and the same shall be delivered to the law firm of Shutts, Bowen, Simmons, Prevatt & Julian as attorneys for the stockholders to be held in escrow for them pursuant to the terms of this Agreement.

(5) There is attached hereto a schedule of the outstanding obligations of the Company which is warranted to be correct by the stockholders; and it is understood and agreed that in the event the unsecured debts are in excess of the amount of said debts as set forth in said schedule in an amount over five (5%) percent thereof then such excess shall be chargeable as against the purchase price for the stock being sold by NELSON A. WHYTE and FRED L. HICKLING as set forth in paragraph 2 above in the proportions held by them respectively; and in the event that there is disclosed any secured indebtedness over and above those set forth in said schedule hereto attached such excess of said secured indebtedness shall likewise be charged to the purchase price of the stock being sold to NELSON A. WHYTE and FRED L. HICKLING as set forth in paragraph 2 above in the proportions held by them respectively.

(6) The stockholders represent that there are no outstanding contracts of employment with anyone in the organization other than the existing contract with the labor union of the employees.

(7) It is understood and agreed that Nelson A. Whyte shall be employed in an official capacity as operating head of the company subject to the control of the purchaser at all times until such time as the obligations

due to him and Fred L. Hickling, as set forth in paragraphs "1" and "2" above, remain unpaid and as long thereafter as is mutually agreeable between him and the company. It is agreed that during the term of his employment, his compensation shall be fair and reasonable with due consideration given to his capabilities, services to the company and the earning capacity of the company; and that his salary for the period of six months from the date of this Agreement shall be $500 per month, after which time his compensation shall be determined in the light of the operating and financial condition of the company and the fair and reasonable value of his services. During the period of his employment, Mr. Whyte shall devote his full time and his best efforts to the promotion of the best interests of the company. It is further agreed that Mr. Whyte may terminate his employment with the company at any time after giving six months' notice of his intention so to do to the company,

(9) The purchaser agrees to make available to the company experienced and capable personnel for the reorganization of the company along efficient lines and in accordance with customary practices in the bus transportation business. The purchaser shall have complete control, direction and supervision for the operation of the company and its business and shall provide men of proven ability in maintenance, transportation, schedule writing, insurance, safety, accounting and management in order to insure the most efficient operation possible. The purchaser will make available immediately to the company approximately 12 used buses to be leased or rented to the company on a fair and reasonable basis for the purpose of supplementing the present equipment of the company and to enable it to serve better the territory re-

quired to be served by the company in the greater Miami area. The rental to be agreed upon shall be due and payable on a monthly basis and the maintenance and upkeep of this rented equipment shall be the responsibility of and at the expense of the company. The purchaser shall exert his best efforts in bringing about an improvement in the financial structure of the company by deferment agreements with creditors and such other means as may be found necessary or expedient, but nothing herein contained shall require the purchaser to invest any sums in the company.

(10) It is understood and agreed that until the obligations described in paragraphs "1" and "2" are paid in full that Nelson A. Whyte shall be retained as a member of the Board of Directors of the company and that he shall have complete access at all reasonable times to the books and records of the company.

(11) It is further agreed that as long as said obligations remain unpaid in whole or in part, that the company will not do any of the following without the consent of Nelson A. Whyte:

(a) Change the principal business of the company as it now exists, which is the rendering of transportation service by motor bus to certain areas of Dade and Broward Counties, Florida.

(b) Incur any outstanding indebtedness other than the existing indebtednesses and such other indebtedness as in the best judgment of the purchaser shall be reasonably necessary or expedient in the operation of the business.

(c) Mortgage or pledge any of the principal assets of the business other than to incur the usual equipment obligations for the purchase or exchange of transportation equipment.

(d) Sell, transfer, lease or impair any operating franchise or certificate of public convenience and necessity which is essential in the operation of the business.

(e) Issue any additional capital stock of the company.

(f) Pay any salaries except for reasonable services rendered to the company.

(12) Nelson A Whyte hereby agrees, in consideration of the covenants herein contained, that he will not, during the period of this agreement, engage in or acquire interest in any competing business in the Greater Miami area, or do anything which shall in any manner detract from his full loyalty and service to the company.

(13) This Agreement and all acts required to be performed by the company hereunder shall be approved by formal action of the stockholders and directors of the company and duly recorded in the minutes of the company. The stockholders shall secure the resignations of all officers and directors of the company except that Nelson A Whyte shall remain as a director, as provided above in paragraph "10."

IN WITNESS WHEREOF, the parties hereto have

executed this Agreement as of the day and year written above.

COAST CITIES COACHES, INC.

By /s/ NELSON L. WHYTE
President

Attest:

/s/ FRED L. HICKLING, Secretary

/s/ NELSON L. WHYTE
/s/ FRED L. HICKLING
/s/ GEO. L. MORRIS as Trustee for a corporation to be formed
(SEAL)

March 18, 1955

Coast Cities Coaches, Inc.
1034 East 28th Street
Hialeah, Florida

Attention: Mr. Donald S. James, President

In re: Nelson L. Whyte

Coast Cities Coaches, Inc.

Gentlemen:

Paragraph three (3) of the agreement dated January 19, 1952, between Coast Cities Coaches, Inc., therein referred to as "the Company" and Nelson L. Whyte and Fred L. Hickling, therein referred to as "the stockholders" provides that the indebtedness due to "the stockholders"

as set forth in paragraphs one (1) and two (2) of said agreement, shall be paid by applying on said indebtedness one-half (½) of the net earnings of the company computed annually at the end of each calendar year. An examination of the operating statements of "the company" for calendar years 1953 and 1954 discloses that the net earnings of "the company" computed in the manner prescribed by said paragraph three (3) amounted to $21,761.15, fifty per cent (50%) of which, amounting to $10,880.57 according to said paragraph is payable to Nelson L. Whyte and Fred L. Hickling in the proportion therein stipulated. The amount due Nelson L. Whyte (82.145%) is therefore $8.-937.84, and payment of said sums in accordance with said contract is hereby formally demanded.

Your attention is also called to paragraph seven (7) of said agreement, reading as follows:

> "(7) It is understood and agreed that Nelson A Whyte shall be employed in an official capacity as operating head of the company subject to the control of the purchaser at all times until such time as the obligations due to him and Fred L. Hickling, as set forth in paragraphs '1' and '2' above, remain unpaid and as long thereafter as is mutually agreeable between him and the company. It is agreed that during the term of his employment, his compensation shall be fair and reasonable with due consideration given to his capabilities, services to the company and the earning capacity of the company; and that his salary for the period of six months from the date of this Agreement shall be $500

per month, after which time his compensation shall be determined in the light of the operating and financial condition of the company and the fair and reasonable value of his services. During the period of his employment, Mr. Whyte shall devote his full time and his best efforts to the promotion of the best interests of the company. It is further agreed that Mr. Whyte may terminate his employment with the company at any time after giving six months' notice of his intention so to do with the company."

Mr. Nelson L. Whyte is now, and always has been ready, willing and able to serve in an official capacity as operating head of the company subject to the control of the purchasers at all times, and hereby renews his offer to do so, and since the obligations due to him and Fred L. Hickling as set forth in paragraphs "1" and "2" of said contract remain unpaid, he is entitled to be so employed, and formal demand is hereby made upon the company that he be so employed forthwith, and without delay.

In view of the fact that his discharge as operating head of the company was unauthorized and in violation of the terms of paragraph seven (7) of said contract, formal demand is hereby made upon the company for payment to Nelson L. Whyte of accrued salary at the rate of $500 per month for the period from January 5, 1953 to February 28, 1955 in the sum of $12,915.00.

Unless a satisfactory response to the formal demands hereby made is received with ten (10) days from the date hereof, it will be necessary to file suit to en-

force compliance with the terms of said contract. Please be governed accordingly.

Very truly yours,

/s/ L. J. CUSHMAN
L. J. CUSHMAN, Attorney for
Nelson L. Whyte

LJC:efs

EXHIBIT 7

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1958

CASE NO. 57-402

COAST CITIES COACHES, INC., a Florida corporation; GEORGE L. MORRIS and STANLEY L. GREEN,

Appellants,

vs.

NELSON L. WHYTE and FRED L. HICKLING,

Appellees.

ASSIGNMENTS OF ERROR AND DIRECTIONS TO THE CLERK

Comes now the Appellee, NELSON L. WHYTE, by his undersigned Attorneys Marchant & Perkins, and files

this his Assignments of Error and Directions to the Clerk, and assigns as errors:

1. The Court erred in entering its judgment of May 8, 1958, recorded in Minute Book 1, at Page 360, on the 8th day of May, 1958.

2. The Court erred in applying Section 608.52, Florida Statutes Annotated to any of the issue involved in this cause, in that the provisions of said Section are not germane, and by reason thereof this Appellee has been deprived of due process of law in violation of Section 12 of the Declaration of Rights of the Constitution of Florida, and the 14th Amendment to the Constitution of the United States of America.

3. The Court erred in refusing to construe the contract as provided by its own standard, specifically overlooking the fact that the parties themselves, by their contract, expressly stipulated that "the net earnings of the company" should be computed and determined in a certain specified manner, that in accordance with "standard accounting practices"; and, that in departing from the specified method the Court undertook to rewrite the contract and made a different contract for the parties, and in so doing deprived the Appellee of due process of law in violation of Section 12 of the Declaration of Rights of the Constitution of Florida, and the 14th Amendment to the Constitution of the United States of America.

4. That Section 608.52, Florida Statutes Annotated is invalid where relied upon by the District Court of Appeal in its Judgment of May 8, 1958, its Order and

Judgment of June 12, 1958, and its Mandate of June 12, 1958, in that it deprives the Appellee of due process of law in violation of Section 12 of the Declaration of Rights of the Constitution of Florida, and the 14th Amendment to the Constitution of the United States of America.

5. The Court erred in entering its Order and Judgment of June 12, 1958, denying Appellee's Petition for Rehearing, which said Order and Judgment was recorded in Minute Book 1, at Page 423, on the 12th day of June, 1958.

6. The Court erred in entering its Mandate of June 12, 1958, filed for record on June 13, 1958, and recorded on June 17, 1958, in Chancery Book 1342, on Page 491 of the records of the Lower Court (i.e. the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida) and directing therein that further proceedings be had with the result that there was erroneously entered, pursuant to a "Motion for Final Order Pursuant to Mandate", an order dismissing the Complaint with prejudice, which said order was entered on the 17th day of July, 1958, and filed for record on that date, and recorded on the 18th day of July, 1958, in Chancery Order Book 1347, at Page 313 of the Public Records of Dade County, Florida.

DIRECTIONS TO THE CLERK

Said Appellee, NELSON L. WHYTE, directs the Clerk to prepare the Transcript of Record on appeal in said cause, and in the preparation thereof comply with the following direction:

1. Transmit to the Supreme Court of Florida the original record and proceedings on file in the District Court of Appeal of Florida, for the Third District, together with all briefs submitted, the Petition for Re-hearing, the Entry of Appeal and these Assignments of Error and Directions to the Clerk.

Respectfully submitted,

MARCHANT & PERKINS

By JOSEPH A. PERKINS
Attorneys for Appellee,
Nelson L. Whyte
1107 Biscayne Building
Miami 32, Florida

I CERTIFY that a copy of the above and foregoing Assignments of Error and Directions to the Clerk has been served upon SHUTTS, BOWEN, SIMMONS, PREVATT & BOUREAU, Attorneys for Coast Cities Coaches, Inc., First National Bank Building, Miami, Florida, and MILTON M. FERRELL, ESQ., Attorney for George L. Morris and Stanley L. Green, 2nd Floor Five Fifty Building, Miami, Florida, by delivery thereto, this 15 day of August, 1958.

JOSEPH A. PERKINS
Of Counsel for Appellee.